

No. 76-1503

Supreme Court, U. S.

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In the Supreme Court of the United States, CLERK

OCTOBER TERM, 1976

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

MEMORANDUM FOR THE UNITED STATES AND
THE INTERSTATE COMMERCE COMMISSION

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**MEMORANDUM FOR THE UNITED STATES AND
THE INTERSTATE COMMERCE COMMISSION**

The United States and the Interstate Commerce Commission submit this memorandum as appellees pursuant to Rule 10(4) of the Rules of this Court.

The pertinent facts and the procedural history of this case—which is before this Court for the second time—are set forth accurately and succinctly in the jurisdictional statement (pp. 4-7).

We generally agree with appellants' contentions on the merits¹ that the district court's refund order interferes

¹The United States as statutory defendant took no position in the district court. While it remains neutral as to the ultimate disposition of the claims for refunds, it is concerned with preserving the proper allocation of functions between the Commission and reviewing courts.

We do not share appellants' doubts (J.S. 7-10) concerning this Court's jurisdiction. The action to review and set aside the Commission's orders

with the Commission's primary jurisdiction (J.S. 10-20). We did not file a separate appeal, however, because the questions presented by the district court's decision, when viewed in light of the peculiar procedural background of this litigation, seemed largely *sui generis* and not likely to be of sufficient recurring importance to warrant invoking this Court's mandatory appellate jurisdiction.

Although the case is now before this Court on appeal, and although we agree with appellants that the district court's judgment and order are incorrect, we submit that intervening events have made it unnecessary for this Court to reach the merits of the appeal at this time.

The issue in this case is whether appellants should be required to refund certain charges collected by them between July 7, 1972, and June 18, 1973.² In a parallel

was required, under 28 U.S.C. (1970 ed.) 2325, to be heard and determined by a three-judge district court. The appeal from that court's initial judgment was thus properly brought to this Court, which affirmed in part and remanded in part with directions to the district court to enter a further order on remand. The same three-judge court, acting in purported compliance with this Court's instructions, had jurisdiction on remand to enter the order that is here under review. Although the matter in issue on remand was the disposition of amounts collected by appellants during the pendency of the first appeal (see 412 U.S. at 802, n. 1), that did not bring the case within the scope of the statutory exception to the former three-judge court procedure, because the district court was responding to this Court's directions rather than reviewing an "order of the Interstate Commerce Commission for the payment of money***." 28 U.S.C. (Supp. V) 1336(a), 2321(b). In our view, therefore, the district court's present judgment, like its earlier one, is properly reviewable on direct appeal to this Court. 28 U.S.C. 1253. See Section 10, Pub. L. 93-584, 88 Stat. 1918.

²July 7, 1972, is the date on which this Court stayed the first judgment of the district court on condition that appellants keep account of the amounts received from the charges that were at issue on the first appeal (see 409 U.S. 801). June 18, 1973, is the date of this Court's decision in the first appeal.

proceeding, the genesis of which is described in the jurisdictional statement (pp. 6-7), the United States Court of Appeals for the District of Columbia Circuit recently set aside a Commission order denying a petition by the Secretary of Agriculture seeking refund of the same charges from the same railroads for the broader period of May 4, 1971, through March 24, 1975. *Secretary of Agriculture v. Interstate Commerce Commission*, No. 76-1026, decided March 11, 1977, reproduced at J.S. App. G1-G5. The court of appeals held that, while "the Commission's authority to order a refund under §15(7) is discretionary" (J.S. App. G3), its determination not to order refunds in the case before the court could not be affirmed because the Commission did not give the reasons for its decision (*id.* at G4). The court of appeals therefore remanded the record to the Commission "to reconsider the Secretary's request and announce its eventual decision in a reasoned opinion" (*id.* at G5). The Commission thereafter reopened the proceeding for further consideration in accordance with the court of appeals' judgment.

The refund issue now before the Commission for reconsideration thus fully embraces the question resolved by the district court in the present case. The Commission's decision on remand presumably will extend to the full four-year period, which includes the one-year period involved in this appeal.

This intervening development represents a material change in circumstances that bears directly on the propriety of the district court's judgment. It is no longer the case, as the district court stated, that "there are no further proceedings pending before the Commission" (J.S. App. A3). Although the district court was directed by this Court (412 U.S. at 802, n. 1) to enter an order disposing of the amounts collected during the one-year period corresponding to the effectiveness of this Court's stay order,

that does not obviate appropriate deference to the Commission's primary jurisdiction over regulatory questions inextricably intertwined with the equitable aspects of refunding charges collected while the rates were lawfully in effect. See *Moss v. Civil Aeronautics Board*, 521 F. 2d 298, 308-309, 314-315 (C.A.D.C.), certiorari denied *sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966; *Southern Ry. Co. v. United States*, 412 F. Supp. 1122, 1147-1148, 1150-1151 (D. D.C.); *Atchison, T. & S.F. Ry. Co. v. Baltimore & O. R.R. Co.*, E.D. Pa., No. 74-1859, decided June 22, 1976. That principle of deference should apply with particular force here, since the Commission now has before it the same issue that the district court undertook to decide. To allow the district court's decision to stand risks a conflict in results between the court's disposition of the charges collected during the one-year stay period and the Commission's decision as to such charges for the full four-year period.

In these circumstances, we submit that the district court's judgment should be vacated and the case remanded to that court with instructions either to hold the matter in abeyance pending the Commission's decision on remand from the court of appeals or to remand this proceeding to the Commission for further consideration

in connection with its reconsideration of the Secretary of Agriculture's petition.³

Respectfully submitted.

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³If, by the time this case is decided by this Court, the Commission has issued its order on remand, then the appropriate disposition, in our view, would be a remand to the district court for further consideration in light of the Commission's order.